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SUPREME COURT, U.S.

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No. 06-1452

IN THE

SUPREME COURT OF THE UNITED STATES

KEITH L. MILLER,

Petitioner

v.

GENEVA FINNIN, GUARDIAN & ANOTHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS SUPREME JUDICIAL COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In March, 2000, the Respondent, Geneva Finnin ("Finnin"), was appointed guardian of her grandmother, Geneva Harden (hereinafter, "Harden") by the Massachusetts Probate Court.[1] In June, 2000, Finnin executed a written Offer to Purchase (hereinafter, "OTP"), which was addressed the "Owner of Record", whereby she agreed to sell certain real estate owned by her ward, Harden, to the Petitioner, Keith L. Miller ("Miller"), for $230,000.00. Finnin did not identify herself as Harden's guardian on the document. There was, however, undisputed evidence in the case that Finnin was selling the property out of "an urgent need of funds with which to support her grandmother." Petition, Appendix "B", p. 8a.[2] Finnin sought a license to sell the property to Miller in the Probate Court pursuant to Massachusetts General Laws c. 201, § 37 ("A guardian or conservator shall pay all just debts which are due from his ward out of the personal property, if sufficient, and, if not, out of the real property, ***upon obtaining a license for the sale thereof*** as provided in chapter two hundred and two"). She subsequently received a higher offer and sought a second license to sell to the higher offeror in accordance with her fiduciary duty to present a higher offer to the Probate Court. Harden died before the Probate Court acted on either license to sell. ***Accordingly, no license to sell the subject property to Miller was ever issued by the***

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[1] Harden suffered from dementia.

[2] Although not strictly germane to this Petition, it should be noted that Finnin claimed at the trial of this case, that Miller, a successful real estate investor and practicing attorney, tried to take advantage of her desperation by obtaining the property at an unreasonably low price.

Massachusetts Probate Court prior to Harden's death, as required by M.G.L. c. 201, § 37.

Miller brought an action in the Massachusetts Superior Court alleging a breach of contract by Finnin. On April 3, 2002, following a jury trial, the Massachusetts Superior Court (Locke, J.) entered a judgment in Miller's favor specifically enforcing the OTP.

Finnin and the other Defendant-Respondent, Kou-Chen Kao ("Kao"),[3] appealed the Judgment. On May 21, 2002, the parties entered into a "Stipulation and Order" in lieu of a stay pending appeal which had been requested by Finnin and Kao.[4] In the Stipulation and Order, which became an order of the Superior Court, Miller agreed to re-convey Harden's property to Kao in the event that the Massachusetts appellate courts reversed the Judgment.

In a summary disposition dated September 29, 2006, the Massachusetts Appeals Court reversed the Judgment and ordered that a Judgment be entered in favor of Finnin and Kao. In particular, the Appeals Court held that the OTP "became permanently unenforceable because a condition precedent, the issuance of a license to sell, could never be satisfied ... and [Finnin] was relieved of her commitment to convey the property." Miller v. Finnin, 67 Mass.App.Ct. 1108, 854 N.E.2d 463 (2006).

In so doing, the Appeals Court expressly relied upon Geoghegan v. Clay, 362 Mass. 117, 284 N.E.2d 608 (1972), in which the Supreme Judicial Court of Massachusetts ("SJC") considered this specific issue and held, clearly and

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[3] Finnin sold the Northampton Street property to Kao while the case was pending.

[4] The Stipulation and Order is annexed hereto as Appendix "A".

unequivocally, that the absence of a license to sell issued by the Probate Court prior to the death of the ward renders such a contract legally ***unenforceable*** and precludes it from being specifically enforced. 362 Mass. at 118. See also Minnehan v. Minnehan, 336 Mass. 668, 669-70, 147 N.E.2d 533 (1958) (license to sell cannot be issued after death of the ward); Onanian v. Leggat, 2 Mass.App.Ct. 623, 628, 317 N.E.2d 823 (1974) ("[A]n agreement which is conditional upon the procurement of a license ***will not be enforced unless and until the license has been obtained*** ...") (emphasis added). The issue regarding the absence of a license to sell had been repeatedly raised and briefed by Finnin and Kao during and post-trial, but the Trial Court Justice mistakenly enforced the OTP despite the absence of a license to sell from the Probate Court.

The decision of the Appeals Court was, therefore, based upon well established Massachusetts precedent. In fact, the issue presented by the appeal was so clear that the Appeals Court issued its decision pursuant to Rule 1:28 of Massachusetts Appeals Court Rules for the Regulation of Appellate Practice, which is reserved for cases where "some clear error of law has been committed ..."[5]

On October 16, 2006, Miller filed a Petition for Rehearing with the Appeals Court, ***claiming for the first time***, that another provision in M.G.L. c. 201, § 37, dictated a different result in the case. The Petition was denied on January 12, 2007. Using the same argument, Miller also filed an Application for Further Appellate Review with the Massachusetts Supreme Judicial Court ("SJC") on October 18, 2006. The SJC denied his FAR application on February 5, 2007. On March 12, 2007, Miller filed a Petition for

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[5] Rule 1:28 also provides that "the [appellate] panel need not provide an opportunity for oral argument before disposing of cases under this rule," although a hearing was conducted in this case.

Reconsideration of the SJC's denial of his Application for Further Appellate Review, which was also denied summarily by the SJC on March 29, 2007.

During the six months in which Miller unsuccessfully raised his belated argument regarding the other provision of M.G.L. c. 201, § 37 in the Massachusetts appellate courts, Miller continued his temporary possession of Kao's property and has been collecting and keeping a substantial amount of rent each month. In light of the SJC's denial of his appeal and Miller's insistence on filing this Petition, the Superior Court has entered an order requiring that the property be placed under the control of a receiver.

Not satisfied with the three bites at the apple which were afforded to him by the Massachusetts appellate courts, Miller is now asking this Court to overrule the decision of a lower Massachusetts appellate court on a matter involving purely state law issues which was upheld by the SJC. As will be demonstrated below, there is no procedural or substantive basis for granting Miller's Petition for Writ of Certiorari, and its filing is primarily a dilatory tactic to allow Miller to continue to benefit prior to the return of the property to Kao.

REASONS FOR DENYING THE WRIT

SUMMARY

This Court should deny the Writ for the following reasons:

(1) This case concerns a decision of a lower Massachusetts appellate court on a matter involving classic state law issues, and does not present a federal question, substantial or otherwise, worthy of this Court's review;

(2) Miller's Writ is premised on a belated and erroneous interpretation of a Massachusetts statute; and

(3) Miller's belated argument was not afforded a hearing by the Massachusetts appellate courts because it lacks merit, and he is not being deprived of a legitimate ownership interest in real property.

I. THERE IS NO PROCEDURAL BASIS FOR GRANTING MILLER'S PETITION FOR A WRIT OF CERTIORARI.

As Miller is aware, the requirements governing review on a Writ of Certiorari provide that this Court may grant certiorari where:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10 of the Rules of the United States Supreme Court.

This case concerns a decision of a lower Massachusetts appellate court on a matter involving classic state law issues (i.e., contract and probate), and does not involve a "federal question" ("important" or otherwise) which has created a conflict amongst various courts. In other words, this case has no standing in the United States

Supreme Court. For this reason alone, Miller's Petition for a Writ of Certiorari should be denied. The Respondents submit that Miller has elected to petition this Court to delay the inevitable re-conveyance of the property to Kao, thereby unjustly depriving Kao of his property and its benefits.

II. THE SUBSTANTIVE BASIS FOR MILLER'S WRIT IS EQUALLY UNAVAILING.

Miller contends that the decision of the Appeals Court "[made] new law, abrogating a controlling statute [M.G.L. c. 201, § 37] without mentioning or considering the statutory provision". Writ, p. 11. Miller's contention is completely without basis.

As was noted above, M.G.L. c. 201, § 37 (first par.) requires the procuring of a license as a precondition to the enforcement of a contract by a guardian to sell real property owned by an incompetent ward. Thus, the decision of the Appeals Court was in conformance with the applicable statute, not in contravention of it. The section of § 37 upon which Miller's argument is premised as follows:

> Individual liability of the conservator or guardian shall be determined as follows:
>
> (a) Unless otherwise provided in the contract, a conservator or guardian shall not be individually liable on a contract ***properly entered into in his fiduciary capacity in the course of the administration of the estate*** unless he failed to reveal his representative capacity and identify the estate in the contract.

M.G.L. c. 201, § 37 (second par.) (emphasis added).

The second paragraph of § 37 merely addresses whether the conservator or guardian incurs personal liability on an ***otherwise enforceable contract*** when the person fails to identify his or her representative capacity in the contract. The mere existence of this portion of the statute does ***not*** mean, as Miller's argument presupposes, that a fiduciary who fails to reveal that he or she is acting in a representative capacity, is ***automatically*** liable on an individual basis, even absent a legally unenforceable contract.[6] Thus, Miller's argument is without merit and the Massachusetts Appellate Courts did not "abrogate" any statute or otherwise overstep their bounds vis-à-vis the Legislature.

It should also be noted that although the Appeals Court did not specifically discuss the second paragraph of § 37 in its decision (because Miller himself never mentioned it in his Brief), it did address at length Miller's argument that "while the defendant's obligation as a fiduciary might have lapsed, she remained liable on the written agreement ***in her individual capacity***." Writ, Appendix "B", p. 7a (emphasis added). As the Appeals Court correctly found, "there being no evidence either that [Finnin] knew that she would acquire the property under Harden's will, or that [Finnin] knew that Harden's death was imminent, the jury could not reasonably infer that the parties contracted in anticipation that [Finnin]

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[6] For example, this provision of § 37 would have been relevant to this case if the Probate Court had issued a license to sell to Finnin, and the question arose whether she could be held individually liable for the damages which Miller contended that he incurred as a result of the alleged breaching of the OTP by Finnin (the Superior Court awarded Miller $14,580.00 for net income lost during the delay in acquiring the property). Since there was no legally enforceable contract in the first place, the question of whether Finnin incurred personal liability under § 37 due to her failure to place the word "guardian" after her signature is irrelevant.

would soon become the owner, and was binding herself to sell the property when she in fact acquired title." Writ, Appendix "B", p. 9a.

In other words, the Appeals Court was willing to overlook § 37's requirement of a license to sell if Finnin was actually contracting in her individual capacity, but there was no evidence to support such a finding. Moreover, as the Appeals Court concluded, "[h]e [Miller] was certainly constructively aware, and appears to have been actually aware, that the defendant [Finnin] while she was a guardian, could not convey the property absent a license". Writ, Appendix "B", p. 8a. Indeed, the Court found that Miller had prepared a purchase and sales agreement and included a provision requiring Finnin to obtain a license to sell from the Probate Court. In light of these facts and circumstances, it is disingenuous for Miller to now claim that the second paragraph of § 37 transforms Finnin's status and liability from a fiduciary to an individual, simply because Finnin mistakenly omitted the word "guardian" after her signature on the OTP.

III. MILLER WAS AFFORDED DUE PROCESS AND HAS NOT BEEN DEPRIVED OF ANY PROPERTY RIGHT.

In his Writ, Miller repeatedly insists that he was denied "due process" because "to this day, no state court provided any indication why a controlling act of the legislature does not dictate the outcome of this case." Writ, p. 9. As was noted above, Miller presented his argument regarding the second paragraph of § 37 to both the Appeals Court and the SJC. The fact that these Courts denied his further appeals without affording him a hearing is not the result of any denial of due process – it simply reflects that fact that his argument lacked merit and it did not necessitate any discussion.

Finally, Miller's assertion that he is being "deprived ... of his ownership of valuable real property" [Writ, p. 9] without due process is nonsensical. Miller's status after the decision of the Appeals Court was merely that of an offeror under a failed contract. The only reason that Miller is currently in possession of Kao's property is that Kao agreed, in lieu of a stay pending the appeal, to convey the property to Miller pending the results of the appeal. Miller, of course, agreed to convey the property back if Kao prevailed. In addition, the Superior Court has ordered that the property be placed under the control of a receiver. Given the conditional and temporary nature of Miller's ownership of Kao's property, his assertion that he is being deprived of a legitimate ownership interest in real property is erroneous.

CONCLUSION

There is no procedural basis for granting Miller's Writ since there is no federal issue and a highest state court has acted on a state law issue. In addition, his argument regarding the second paragraph of § 37 does not hold water, and he was not denied due process. Accordingly, the Writ should be denied forthwith.

THE RESPONDENTS

By their Attorney,

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT
C.A. No. 00-4288B

KEITH L. MILLER

Plaintiff,

V.

GENEVA FINNIN, Individually, as Guardian and Executrix of the Estate of GENEVA HARDEN, KOU-CHEN KAO, HUEI-LING TSAI, CHUN-JEN WANG, and HONG-LIN CHEN, Individually and in their Capacities as General and Limited Partners of the EAST-WEST LIMITED PARTNERSHIP,

Defendants.

STIPULATION AND ORDER

Plaintiff and Defendants hereby agree as follows:

1. There shall be no Stay of the Judgment and Order of Specific Performance entered in this case on April 3, 2002;

2. Defendant, Kou-Chen Kao, shall immediately transfer and convey title to the property located at 175 Northhampton Street, Boston, Massachusetts ("Property"), to Defendant, Geneva Finnin, as Executrix, in accordance with this Court's Order;

3. Thereafter, in consideration for tender of the sum of $230,000.00 by Plaintiff to Defendant, Geneva Finnin, as Executrix, she shall convey good and marketable title to Plaintiff, free and clear of all liens and encumbrances on or before May 31, 2002, all in accordance with the Court's prior Order;

4. During the pendency of the Appeal, Plaintiff shall take such steps as necessary to make the units marketable for rental purposes;

5. If Plaintiff prevails in a final Appeal, he shall retain title to the Property without further recourse to any party with respect to the Order of Specific Performance;

6. If Plaintiff prevails in a Final Appeal, he shall be paid such sum in money damages as is awarded by the Court;

7. If Defendants prevail in a final Appeal, resulting in the Vacating of the Order of Specific Performance, then Plaintiff agrees to reconvey the Property to Defendant, Kou-Chen Kao, free and clear of any liens and encumbrances, only upon satisfaction of all of the following conditions on or before 60 days from the date of the final Appellate decision:

a. Kou-Chen Kao tenders $232,000.00 to Plaintiff;

b. Kou-Chen Kao tenders a sum equal to fifty (50%) percent of the demonstrated costs incurred by the Plaintiff for repairs to make the units marketable for rental, up to a total of $25,000.00 for Kou-Chen Kao's portion.

8. If Defendants prevail in the Appeal, they agree to waive any claim for lost rental income during the pendency of the Appeal period;

9. Plaintiff agrees not to transfer or convey title to the Property to any unrelated third party during the pendency of the Appeal;

10. This Stipulation and Order shall survive and be binding upon the Parties as an independent and enforceable contract under Massachusetts law;

11. If any party shall fail to fulfill any of the terms of this agreement, the prevailing party in any subsequent legal proceeding to enforce such terms shall be entitled to his/her reasonable attorney fees and costs incurred to enforce this Agreement.

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Plaintiff, Keith L. Miller

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Defendant, Kou-Chen Kao

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Defendant, Geneva Finnin

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